

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUN 21 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MATTHEW M.,)	2 CA-JV 2011-0008
)	DEPARTMENT A
Appellant,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 28, Rules of Civil
ARIZONA DEPARTMENT OF ECONOMIC)	Appellate Procedure
SECURITY and SYDNEY M.,)	
)	
Appellees.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. J17943800

Honorable Javier Chon-Lopez, Judge

AFFIRMED

Child and Family Law Clinic

By Paul D. Bennett, a clinical professor appearing
under Rule 38(d), Ariz. R. Sup. Ct. and
Alan Cechanowitz, a student certified pursuant
to Rule 38(d), Ariz. R. Sup. Ct.

Tucson
Attorneys for Appellant

Thomas C. Horne, Arizona Attorney General
By Pennie J. Wamboldt

Prescott
Attorneys for Appellee
Arizona Department of Economic Security

B R A M M E R, Presiding Judge.

¶1 Matthew M., father of Sydney M., born in October 1995, appeals from the juvenile court's order adjudicating Sydney dependent. Matthew challenges the sufficiency of the evidence to support the court's order and claims the court unlawfully shifted to him the burden of proof. We affirm for the reasons stated below.

¶2 In November 2009, Child Protective Services (CPS) removed then fourteen-year-old Sydney's younger siblings from their home with the children's mother, Deirdre D., because of reports that the home was filthy and there was little food for the children to eat, and Deirdre was neglecting the children, had a history of drug use, and had been arrested for possession of drug paraphernalia. Sydney was living with an aunt in Cottonwood, Arizona at the time pursuant to a power of attorney. Although CPS intended to remove Sydney from that placement and place her into foster care, Sydney ran away and was returned to another aunt in Cottonwood.

¶3 The Arizona Department of Economic Security (ADES) filed dependency petitions as to all of the children, their mother, and the various fathers of these children. Sydney was adjudicated dependent as to Deirdre in February 2010. Matthew filed a motion to change venue to Yavapai County, which the juvenile court denied. Thereafter, the court granted Matthew's motion to dismiss the dependency petition as to him on the ground the court had failed to conduct an adjudication hearing within ninety days from service of the petition as required by Rule 55(B), Ariz. R. P. Juv. Ct. But in June 2010, ADES took temporary custody of Sydney, who had been living with Matthew briefly, and filed a second dependency petition as to him. After a hearing in December 2010, the juvenile court adjudicated Sydney dependent as to Matthew. This appeal followed.

¶4 A dependent child is a child adjudicated to be “[i]n need of proper and effective parental care and control and . . . has no parent or guardian willing to exercise or capable of exercising such care and control,” or “[a] child whose home is unfit by reason of abuse, neglect, cruelty or depravity by a parent.” A.R.S. § 8-201(13)(a)(i),(iii). The petitioner in a dependency proceeding must establish by a preponderance of the evidence that the child is dependent. *See* Ariz. R. P. Juv. Ct. 55(C); *see also* A.R.S. § 8-844(C)(1). We will sustain an order adjudicating a child dependent on appeal, unless we find the juvenile court abused its discretion. *See In re Pima County Juv. Action No. 93511*, 154 Ariz. 543, 546, 744 P.2d 455, 458 (App. 1987).

¶5 We view the evidence and construe all permissible inferences in the light most favorable to sustaining the court’s ruling. *See Willie G. v. Ariz. Dep’t of Econ. Sec.*, 211 Ariz. 231, ¶ 21, 119 P.3d 1034, 1038 (App. 2005). We do not reweigh the evidence presented at the dependency hearing because, as the trier of fact, the juvenile court “is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts.” *Ariz. Dep’t of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 4, 100 P.3d 943, 945 (App. 2004).

¶6 The record is replete with evidence about Deirdre’s lengthy history of substance abuse and her failure to care properly for her children. While in her custody, the children were in an environment and exposed to a lifestyle that was chaotic and unsafe. In the late fall of 2009, CPS learned that Deirdre’s seventeen-year-old daughter Dayna and Dayna’s infant child were living with Deirdre and that Dayna had been using methamphetamine. At the end of November 2009, Deirdre and the children were facing

homelessness and they were removed from her custody. When the CPS investigator contacted Matthew, he said he had been separated from Deirdre for years and that Sydney was the result of a “one-night stand.” Sydney was living with an aunt at that time and had been living there since that summer.

¶7 The evidence established Matthew was well aware of Deirdre’s substance abuse. Matthew also had a substance abuse problem and a history of criminal conduct, which had resulted in his conviction of drug-related offenses. The first dependency petition ADES filed as to Matthew alleged he had not yet established paternity, he had criminal convictions relating to the possession and transportation of drugs, and he had not protected Sydney from Deirdre, knowing about her drug use, “unstable living conditions,” and chaotic lifestyle. As part of the case plan for reunification, Matthew was required to establish paternity, which he did, and maintain contact with ADES, which he failed to do. He also failed to respond to the case manager’s letters, which included information about the case plan and a form he was asked to sign and return indicating he agreed to participate in the case plan. Nor did he establish he had a legal source of income or could provide support and a safe home for Sydney.

¶8 Sydney was adjudicated dependent as to Deirdre in February 2010, but as we previously stated, the petition as to Matthew was dismissed in April 2010 because the hearing was not conducted within ninety days of service of the petition. Although no active dependency proceeding was pending as to Matthew, the case manager told Matthew that, in any event, if Sydney were to live with him, “she could not, for any reason, be left alone” with Deirdre. The reason for this restriction, the case manager had

explained to Matthew, was the serious risk Deirdre presented to any child; Deirdre was not complying with her case plan at that time, other than participating in visitation, and as Matthew was aware, she had a lengthy history of substance abuse. The case manager essentially warned him that if Matthew permitted this, it would file another dependency petition as to him and remove Sydney from his custody.

¶9 At the end of May 2010, Matthew removed Sydney from the home of the aunt with whom she had been living and took her to his home in Phoenix. The case manager testified at the dependency hearing that sometime in June, ADES had learned Sydney “showed up” at the CPS office in Tucson with her mother, who was participating in a supervised visitation with her other children. The case manager explained she had spoken to Sydney after that, and Sydney said Matthew left her at Deirdre’s house so she could spend time with her mother. Matthew had not, as he claimed, left Sydney there so he could take a brother of his to Nogales, rather, according to Sydney, Matthew had left her and returned to Phoenix. ADES took Sydney into custody.

¶10 ADES conducted a team decision meeting on June 10, which Matthew attended. He denied he had left Sydney with Deirdre and claimed he had left her with Misty K., a former step-daughter of the father of one of Deirdre’s other children, who also was involved with CPS. Misty had tested positive for methamphetamine use in March while she was pregnant. Matthew felt she was a safe person with whom to leave Sydney. He was asked at the meeting to participate in services so that Sydney could be placed with him. The case manager testified at the dependency hearing that Matthew had responded “he was not going to participate in any services through CPS, because he did

not believe the allegations to be true and he was going to fight them.” He was asked if he and his wife would submit to a drug test at that time and he refused, stating, “My sobriety is between me and my God and I don’t have to share that information with you.”

¶11 ADES immediately filed a second dependency petition as to Matthew, alleging he had placed Sydney in Deirdre’s custody, knowing she had a history of substance abuse and extensive involvement with CPS, and in the custody of others he knew were unsafe because of their use of methamphetamine. The case manager informed Matthew the case plan was the same as the one he previously had been given. He was required to submit to drug testing in light of his history of substance abuse in order to establish he would be an appropriate parent and to assure ADES Sydney would be in a safe environment if placed with him. Between June and December 2010, which is when the dependency hearing was held, he did not contact the case manager to ask about Sydney and he did not submit to drug testing.

¶12 Matthew attended the December hearing telephonically from Phoenix, responding to the court’s comment about his failure to appear in person by stating he chose not to travel to Tucson because it would cost him \$50 and his car might break down during the trip. He denied placing Sydney in Deirdre’s care and denied knowing Misty had been using methamphetamine, claiming it was not his responsibility as a parent to assure the persons with whom he entrusted his child were not using drugs. When asked how long he purportedly had maintained sobriety, he responded, “[T]hat’s a relationship I have with my higher power. My sobriety depends on minding my higher power’s relationship on that. I don’t care to discuss that.”

¶13 At the end of the hearing, the juvenile court commented that Matthew was “too trusting an individual, or maybe just outright lying to the [c]ourt,” but that “under either scenario . . . if he [was] a proper and effective parent,” “he should [have been] aware . . . who he [was] sending his daughter to.” The court noted that Matthew did not believe Deirdre had a substance abuse problem but that this was something he should have known. The court questioned Matthew’s sincerity in claiming he wanted his daughter back, commenting to Matthew, if that were true, “you would do everything in your power [to get her back].” The court added that if Matthew was “clean and sober, as he claims, a drug test would have shown it in a second; but he refused to do that and he refuses to do that today.” The court also commented that by failing to appear in person at the hearing because he was afraid that his car might break down, Matthew “show[ed] that he put[] his interests and his concerns ahead of Sydney’s.” The court then concluded Sydney was dependent as to Matthew.

¶14 Matthew contends on appeal the evidence was insufficient to support the adjudication and that the juvenile court had shifted to him the burden to establish he is willing and capable of properly parenting Sydney, rather than requiring ADES to sustain its burden as the petitioner. We disagree. The evidence established Deirdre had a lengthy history of substance abuse, of which Matthew was well aware. The evidence also established he knew Deirdre had been incapable of providing a stable, safe environment for any child, and that Matthew was well aware of the risks she posed to Sydney if Sydney were left in her care. At the very least, crediting the testimony of witnesses that supported the court’s order, resolving any inconsistencies in the evidence in favor of the

court's order as well, and considering the fact that Matthew's own testimony was internally inconsistent, there was sufficient evidence establishing Matthew knew CPS was concerned about Sydney's safety if left in Deirdre's care. Matthew was warned expressly not to leave Sydney in Deirdre's care. Despite Matthew's protestations to the contrary, there was reasonable evidence from which the court readily could find he had left Sydney with her mother.

¶15 With respect to leaving Sydney with Misty, it was the juvenile court's prerogative to reject Matthew's claim that he did not know she had been taking methamphetamine. And whether he knew or not, the juvenile court reasonably could consider Matthew's statements that it was not his responsibility to determine if persons with whom he entrusted his daughter were using drugs as a reflection of his lack of judgment, inability to protect Sydney, and inability to parent her effectively. Indeed, further reflecting his lack of judgment and supporting the court's order, Matthew testified at the severance hearing that he realized it had been "unsafe" to place Sydney in Misty's care not because of her drug use but because Sydney had been "kidnapped" by CPS. The case manager testified at the dependency hearing, in fact, that she was concerned about Matthew's "ability to make sound decisions."

¶16 Matthew also gave conflicting and incomprehensible testimony about Sydney's placement, further supporting the juvenile court's finding that she was dependent as to him. On the one hand, when asked if he wanted Sydney "placed in [his] home today," he responded, "Absolutely." Yet he also conceded Sydney was doing well where she was, stating he could move to Cottonwood. When asked why he had not

moved there up to that point, he responded he already had lived there so “what’s the point.” Additionally, giving the court reason to question the veracity of Matthew’s testimony, after the second dependency petition was filed in June 2010, the aunt with whom Sydney was residing told the CPS case manager she did not wish to have any contact with Matthew, not even by telephone, “due to the pressure he puts on her and lies he asks her to tell.”

¶17 We also reject Matthew’s argument that because the juvenile court and ADES had asked him to submit to drug testing, the burden in this dependency proceeding had been shifted to him to prove that he is a proper parent. The record shows the court applied the correct standard here and required ADES to prove the allegations of its petition by a preponderance of the evidence. Similarly, it was for the juvenile court, not this court, to determine what inferences the evidence permitted, including the inferences permitted by his repeated refusal to submit to drug testing. *See Jesus M. v. Ariz. Dep’t of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002). The court reasonably could infer, as it appears to have done, that Matthew had, in fact, been using drugs and did not have a sincere desire to do what was asked of him in order to gain custody of his daughter. This and other evidence supported the court’s determination it was not in Sydney’s best interest to be placed with her father. And, “[t]he primary consideration in a dependency case is always the best interest of the child.” *Ariz. Dep’t of Econ. Sec. v. Superior Court*, 178 Ariz. 236, 239, 871 P.2d 1172, 1175 (App. 1994).

¶18 Similarly, Matthew has provided no authority for the proposition that ADES either lacked authority to require him to submit to drug testing or that its demand

that he do so was unreasonable and resulted in burden shifting. In light of the fact that Matthew previously never had Sydney in his custody, and given his own history of involvement with drugs and drug-related criminal convictions, it was entirely reasonable for ADES to require him to be tested for drug use. As the case manager explained at the dependency hearing, ADES's reason for wanting to establish Matthew's sobriety before placing Sydney with him was to ensure the child's safety.

¶19 We note, too, that as the case manager further explained, once a child is taken into temporary custody, parents are expected to engage in services immediately, even before a dependency adjudication, and they are told this at the preliminary protective hearing. Consistent with this testimony, in its June 2010 temporary orders and findings entered just after Sydney was taken into CPS custody, the juvenile court stated Sydney was removed from Matthew's custody because he had "failed to protect the child from unsupervised contact with the mother, despite knowledge of the mother's substance abuse issues," and had "permitted the child to have contact with individuals who actively use methamphetamine." The court also noted ADES had made reasonable efforts to prevent Sydney's removal from his custody by offering Matthew services that he refused to accept. Finally, the order warned him of the consequences of failing to cooperate with ADES, thus advising him he needed to participate in services immediately when it stated, "substantially neglecting or willfully refusing to remedy the circumstances that cause[d] [Sydney] to be in an out-of-home placement, including refusing to participate in reunification services, is a ground for termination of parental rights."

¶20 Finally, we reject Matthew’s argument that it was improper for the juvenile court to consider his failure to attend the hearing in person in finding Sydney dependent. The court apparently regarded this as a demonstration of Matthew’s lack of interest in, commitment to, or sincerity about reunifying with Sydney. From this and other evidence presented at the hearing, the juvenile court reasonably could find, as it did, that Matthew was “at least, not willing to exercise—or capable of exercising proper parental care and control” of Sydney.

¶21 For the reasons stated, we reject Matthew’s challenges to the juvenile court’s order adjudicating Sydney dependent as to him and affirm it.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge